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HIGH SEAS NARCOTICS SMUGGLING AND SECTION 955a OF TITLE 21: OVEREXTENSION OF THE PROTECTIVE PRINCIPLE OF INTERNATIONAL JURISDICTION

INTRODUCTION

In an effort to facilitate criminal prosecutions and thereby halt the tremendous flow of narcotics into the United States,¹ Congress in 1980 enacted section 955a of Title 21 of the United States Code, The Marijuana On the High Seas Act.² The statute provides for the punishment of narcotics smugglers apprehended aboard vessels by proscribing possession of a controlled substance with the intent to distribute.³ Prior to the enactment of section 955a, the government was able to punish this offense only by charging conspiracies to violate existing statutes,⁴ a process that frustrated prosecutors and created problems of statutory construction.⁵

1. H.R. Rep. No. 323, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as House Report]; see *Coast Guard Drug Interdiction: Hearings on H.R. 10371 and H.R. 10698 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 119 (1978) (statement of Rear Admiral Norman C. Venzke, U.S. Coast Guard, Chief, Office of Operations, Dep't of Transp.) [hereinafter cited as *Coast Guard Drug Interdiction*]. In 1978, the Coast Guard participated in the seizure of over 150 vessels and 3.5 million pounds of narcotics, worth over \$1 billion. House Report, *supra*, at 4; see *Coast Guard Drug Interdiction*, *supra*, at 119. It is estimated, however, that this accounts for only 8 to 10% of the narcotics transported into the United States by vessel. House Report, *supra*, at 4.

2. Pub. L. No. 96-350, § 1, 94 Stat. 1159 (1980) (codified at 21 U.S.C.A. § 955a (West Supp. 1981)); see *United States v. James-Robinson*, 515 F. Supp. 1340, 1341 (S.D. Fla. 1981). Section 955a was enacted to fill a loophole in the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections throughout U.S.C.). This loophole was created by the repeal in 1970 of § 184a, which proscribed possession of a controlled substance when aboard a United States-registered vessel on a foreign voyage. 21 U.S.C. § 184a (1964) (repealed 1970); *Coast Guard Drug Law Enforcement: Hearings on H.R. 2538 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 2 (1979) (statement of Rep. Mario Biaggi, Chm'n, Subcomm. on Coast Guard and Navigation) [hereinafter cited as *Coast Guard Drug Law Enforcement*]; *id.* at 48 (statement of Peter B. Bensinger, Adm'r, Drug Enforcement Adm'n, U.S. Dep't of Justice).

3. 21 U.S.C.A. § 955a (West Supp. 1981). The statute also proscribes manufacture or distribution of, as well as possession with intent to manufacture, a controlled substance. *Id.* § 955a(a)-(c).

4. See *Coast Guard Drug Law Enforcement*, *supra* note 2, at 65 (statement of Michael P. Sullivan, Ass't U.S. Att'y, Chief, Crim. Div., S.D. Fla.). The conspiracy offenses require a lesser standard of proof than the substantive narcotics violations. *E.g.*, *United States v. Freeman*, 660 F.2d 1030, 1031 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1268 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981); *United States v. Ricardo*, 619 F.2d 1124, 1126 n.1 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Conroy*, 589 F.2d 1258, 1262 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); see *infra* note 100 and accompanying text.

5. See *Coast Guard Drug Law Enforcement*, *supra* note 2, at 34 (statement of Admiral John B. Hayes, Commandant, U.S. Coast Guard, Dep't of Transp.); see,

The broad grant of jurisdiction embodied in section 955a simplifies the process by eliminating the need for a conspiracy charge. Under the statute, federal courts can assert subject matter jurisdiction⁶ over United States nationals regardless of the nationality or location of the vessel upon which they are apprehended.⁷ Jurisdiction is also asserted over foreign nationals when they are aboard United States vessels regardless of location,⁸ stateless vessels⁹ on the high seas¹⁰ and any vessel within the customs waters of the United States.¹¹ Subsection

e.g., *United States v. Hayes*, 653 F.2d 8, 16 (1st Cir. 1981); *United States v. Baker*, 609 F.2d 134, 139 (5th Cir. 1980).

6. "A State's 'jurisdiction' is its competence under international law to prosecute and punish for crime." Dickinson, *Jurisdiction With Respect to Crime*, 29 Am. J. Int'l L. supp., pt. 2, at 435, 467-69 (1935). If a State prescribes or enforces a rule of law that it has no jurisdiction to prescribe or enforce, it is a violation of international law. Restatement (Second) of the Foreign Relations Law of the United States § 8 (1965).

7. 21 U.S.C.A. § 955a(b) (West Supp. 1981). Vessels have the nationality of the State whose flag they are entitled to fly. Convention on the High Seas art. 5, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962). With limited exceptions, the flag State has exclusive jurisdiction over its vessels on the high seas. *Id.* art. 6(1).

8. 21 U.S.C.A. § 955a(a) (West Supp. 1981). A vessel of the United States is defined as "any vessel documented under the laws of the United States . . . or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States." 21 U.S.C.A. § 955b(c) (West Supp. 1981).

9. 21 U.S.C.A. § 955a(a) (West Supp. 1981). This subsection applies to a vessel "subject to the jurisdiction of the United States," *id.*, which is defined as "a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958." 21 U.S.C.A. § 955b(d) (West Supp. 1981). Under the Convention, a vessel assimilated to a vessel without nationality is a vessel that sails under the flags of two or more countries, using them according to convenience. Convention on the High Seas, *supra* note 7, art. 6, para. 2; see *United States v. Egan*, 501 F. Supp. 1252, 1256 (S.D.N.Y. 1980).

10. 21 U.S.C.A. § 955b(b) (West Supp. 1981). The "high seas" means all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation. *Id.* The United States claims a three-mile territorial sea. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923); see P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 56-60 (1927); Carmichael, *At Sea with the Fourth Amendment*, 32 U. Miami L. Rev. 51, 57 (1977). Under the Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964), the United States is granted limited jurisdiction over a "contiguous zone" outside the territorial sea but not exceeding 12 miles from the United States coast. *Id.* art. 24. For purposes of criminal jurisdiction, the United States recognizes the area beyond the three-mile sea as the high seas. *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980).

11. 21 U.S.C.A. § 955a(c) (West Supp. 1981). The customs waters of the United States are waters extending up to four leagues (twelve miles) from the United States coast. 19 U.S.C. § 1401(j) (1976). This area is also referred to as the contiguous zone. See Carmichael, *supra* note 10, at 56. Within this zone, the United States possesses

(a) of section 955a contains the broadest grant of jurisdiction. It applies to foreign nationals aboard stateless vessels on the high seas. More significantly, it does not require any allegation or proof that the controlled substance possessed is intended for distribution within the United States.¹²

This Note examines section 955a in light of established jurisdictional principles of international law. In order to assert jurisdiction over an offense, a State must apply one of the bases of international jurisdiction: universality, nationality, passive personality, objective territoriality or the protective principle.¹³ Only the objective territorial and protective principles can be relied upon when the United States is attempting to prosecute foreign nationals engaged in narcotics trafficking on the high seas in vessels not of United States registry.¹⁴ When an offense is committed outside the territorial United States with the intent to cause an adverse effect within the territory, and such an effect does take place, objective territorial jurisdiction is present.¹⁵ If an act is directed at the security of the United States but produces no actual adverse effect upon the State, protective jurisdiction governs.¹⁶

Critical examination of section 955a reveals the impropriety of applying the statute to foreign nationals arrested aboard stateless vessels on the high seas without any allegation or proof that the controlled substances possessed are intended for distribution within

limited jurisdiction for the purposes of ensuring compliance with fiscal, customs and sanitation laws. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 10, art. 24.

12. 21 U.S.C.A. § 955a(a) (West Supp. 1981). The subsection also applies to United States nationals. *Id.*

13. *E.g.*, *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

14. Universality jurisdiction is unavailable, as that principle applies only to piracy. The nationality principle does not apply because the defendant is not a United States national. Passive personality is unavailable because the United States does not recognize that as a valid basis of jurisdiction. The territoriality principle, or its corollary, the law of the flag theory, is applicable only when the acts proscribed take place within the United States or aboard a United States vessel. *See infra* pt. I.

15. *E.g.*, *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 886-87 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *see infra* notes 40-41 and accompanying text.

16. *E.g.*, *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978), *aff'd sub nom. United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); *see infra* notes 51-53 and accompanying text.

the United States. By simplifying the law, Congress has created a statute that is capable of application in such a manner as to exceed permissible limits of jurisdiction granted a State under international law.

I. PRINCIPLES OF INTERNATIONAL JURISDICTION

Were a State to apply its laws extraterritorially with no consideration given to the right of other States to do the same, the inevitable result would be chaos in the international system and conflicts between sovereigns.¹⁷ Consequently, principles have been developed which regulate the exercise of subject matter jurisdiction by a State over offenses committed within and, more importantly, without its territory.¹⁸ The United States expressed its intention to adhere to these principles in *The Paquete Habana*:¹⁹ "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."²⁰ Congress, however, may override international law, but only where the statute in question expressly provides that it is the intent of Congress to do so.²¹

17. See 1 C. Hyde, *International Law* § 2 (2d rev. ed. 1947); M. von Redlich, *The Law of Nations* §§ 1, 16 (2d ed. 1937).

18. Restatement (Second) of the Foreign Relations Law of the United States §§ 17, 18, 30, 33, 34 & reporter's note 2 (1965); see *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Layton*, 509 F. Supp. 212, 215-16 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); Dickinson, *supra* note 6 at 445.

19. 175 U.S. 677 (1900). The issue was whether fishing vessels flying the Spanish flag were subject to capture off the coast of Cuba by a United States steamship. In his opinion for the Court, Justice Gray held that the seizure of the vessels was in violation of international law. *Id.* at 714. In reaching his conclusion, Justice Gray relied upon ancient principles of international law, which make coastal fishing vessels exempt from capture when plying their trade during time of war. *Id.* at 700.

20. *Id.* Since *The Paquete Habana* was decided, United States courts have consistently reiterated their intention to follow principles of international law. *E.g.*, *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1267 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); *United States v. James-Robinson*, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375, 381-82 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); see L. Henkin, *Foreign Affairs and the Constitution* 221 (1972).

21. See *Spieß v. C. Itoh & Co.*, 643 F.2d 353, 356 (5th Cir. 1981); *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1323 & n.130 (D.C.

Within the international legal system, five principles of subject matter jurisdiction exist.²² Under the most limited and seldom used principle, universality, any State has jurisdiction over an offense if it has custody of the offender.²³ At present, this principle applies only to piracy,²⁴ which is condemned as a violation of the Law of Nations,²⁵ and thus punishable by all.²⁶ Some have argued that slave-trading is also a universally cognizable offense.²⁷ Narcotics trafficking, however, has not been elevated to that status, despite an attempt to do so in 1936.²⁸

The second principle, nationality, is accepted by all States.²⁹ It confers subject matter jurisdiction upon a State over all violations of

Cir. 1980); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980); *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980). This presumption of conformity with principles of international law was first enunciated by the Supreme Court in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The Court stated that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 117-18, 2 Cranch at 118.

22. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); see Dickinson, *supra* note 6, at 445.

23. See Convention on the High Seas, *supra* note 7, arts. 14-19; Restatement (Second) of the Foreign Relations Law of the United States § 34 (1965); Dickinson, *supra* note 6, at 440, 563-64.

24. See *United States v. Holmes*, 18 U.S. 189, 191, 5 Wheat. 412, 417 (1820); Convention on the High Seas, *supra* note 7, arts. 14-19; Dickinson, *supra* note 6, at 563-72.

25. The Law of Nations is a synonym for international law, that body of rules and regulations which governs the conduct of sovereigns in their relations with one another. See *The S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J., ser. A, No. 10, at 18; 1 C. Hyde, *supra* note 17, § 1, at 1-2; 1 L. Oppenheim, *International Law* § 1, at 4-5 (8th ed. 1955).

26. *The S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J., ser. A, No. 10, at 70-71 (Moore, J., dissenting); 2 G. Hackworth, *Digest of International Law* § 203, at 681 (1941); G. Mueller & E. Wise, *International Criminal Law* 8-9 (1965); 2 D. O'Connell, *International Law* 657-60 (2d ed. 1970).

27. Dickinson, *supra* note 6, at 569-70. Under article 19 of the Convention on the High Seas, *supra* note 7, each signatory grants to the others the broad power to board the ships of any signatory which are engaged in piracy in order to punish the offense. The grant of power with respect to slavery, however, is far narrower. Article 13 requires each signatory to take steps to prevent and punish slave trading aboard ships flying that signatory's flag. The article creates no rights of enforcement in signatories regarding slavery in general.

28. The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, *opened for signature* June 26, 1936, 198 L.N.T.S. 299 (entered into force Oct. 26, 1939); see Waddell, *International Narcotics Control*, 64 Am. J. Int'l L. 310, 313 (1970). The United States is not a signatory of the 1936 Convention. U.S. Dep't of State, *Treaties in Force* 315-18 (1981).

29. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); Dickinson, *supra* note 6, at 519; see *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980).

its laws committed by that State's nationals, wherever such offenses are committed.³⁰ When a United States court attempts to give extra-territorial application to a statute based upon the nationality principle, the question is therefore not one of its competence to prescribe under international law, but of congressional intent to give the statute such application.³¹ Although there is a general presumption against extraterritoriality,³² it may be overcome through examination of the legislative history of the statute and the nature of the offense involved.³³

30. *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *United States v. Perez-Herrera*, 610 F.2d 289, 289 (5th Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981); *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980); *United States v. Daniszewski*, 380 F. Supp. 113, 116 (E.D.N.Y. 1974); 1 C. Hyde, *supra* note 17, § 240, at 802-03; 2 J. Moore, *Digest of International Law* § 202, at 255-56 (1906); 1 L. Oppenheim, *supra* note 25, § 145, at 330; 2 T. Rutherford, *Institutes of Natural Law* 180 (3d ed. 1799).

31. *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979); *United States v. King*, 552 F.2d 833, 850-51 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980). In *King*, the United States defendants argued that 21 U.S.C. § 959 (1976), as applied to their acts of distributing heroin in Japan for unlawful importation into the United States, was an unconstitutional extension of Congress's penal power. 552 F.2d at 850. The court rejected this contention, stating that "[t]here is no constitutional bar to the extraterritorial application of penal laws." *Id.* (citing *Blackmer v. United States*, 284 U.S. 421, 436-38 (1932)).

32. *E.g.*, *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Bowman*, 260 U.S. 94, 98 (1922); *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980); *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979); *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980).

33. *E.g.*, *United States v. Bowman*, 260 U.S. 94, 97-98 (1922); *see United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Baker*, 609 F.2d 134, 136-37 (5th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 885 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1259 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. Egan*, 501 F. Supp. 1252, 1258-59 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978), *aff'd sub nom. United States v. Arra*, 630 F.2d 836 (1st Cir. 1980). *United States v. Bowman* is the starting point for inferring extraterritoriality to Congressional penal legislation. The defendant in *Bowman* was a United States national charged with conspiracy to defraud a corporation in which the United States was a stockholder. He argued that the statute under which he was indicted was inapplicable to him because the acts alleged in the indictment occurred on the high seas and in Rio de Janeiro. 260 U.S. at 96-97. The Supreme Court reversed a district court opinion that had quashed the indictment. The Court distinguished between crimes against individuals and crimes against the sovereignty of the State. As to the former, the presumption against

The third basis of international jurisdiction is the principle of passive personality, which confers jurisdiction upon a State when one of its nationals is injured by the offense.³⁴ This principle, accepted by some states but rejected by others, is regarded as an auxiliary basis of competence.³⁵ The United States does not assert jurisdiction based upon the passive personality principle, nor does it accept such assertion of jurisdiction by other States.³⁶

The territorial principle is the fourth basis of jurisdiction available to a State under international law. Territoriality is the fundamental principle of jurisdiction³⁷ and is accepted by all nations.³⁸ The rationale underlying the principle is that within its territorial limits, the competence of the sovereign to define and punish offenses is absolute.³⁹ The United States adheres to the "objective" view of territoriality,⁴⁰ which confers jurisdiction upon a State over offenses commit-

extraterritoriality applies. With regard to the latter, however, the same rule should not govern. *Id.* at 97-98. The government's right to protect itself against obstruction or fraud was deemed to justify an inference of extraterritoriality where necessary. Limiting the locus of these statutes to the "strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." *Id.* at 98.

34. *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Layton*, 509 F. Supp. 212, 216 & n.5 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds sub nom. Rocha v. United States*, 288 F.2d 545, 549 n.4 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

35. *Dickinson*, *supra* note 6, at 445, 578-79; *see United States v. Layton*, 509 F. Supp. 212, 216 & n.5 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981). In *Layton*, the district court, though acknowledging that jurisdiction was available based upon, *inter alia*, passive personality, stated that it was unsure whether nationality of the victim alone would be a sufficient basis for the assertion of extraterritorial jurisdiction. *Id.* at 216 n.5.

36. Restatement (Second) of the Foreign Relations Law of the United States § 30(2) (1965); 2 G. Hackworth, *supra* note 26, § 135, at 179-80; 2 J. Moore, *supra* note 30, § 201, at 228; 6 M. Whiteman, Digest of International Law 103-05 (1968); *see United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979).

37. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909); *The Schooner Exchange v. M'Faddon*, 11 U.S. 74, 85, 7 Cranch 116, 136 (1812); *Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir. 1933); J. Brierly, *The Law of Nations* 232 (5th ed. 1955); 2 J. Moore, *supra* note 30, § 200, at 225-26, § 202, at 243, 263.

38. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885-86 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *Dickinson*, *supra* note 6, at 480.

39. *The Schooner Exchange v. M'Faddon*, 11 U.S. 74, 85, 7 Cranch 116, 136 (1812); *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804); *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980).

40. *E.g.*, *Ford v. United States*, 273 U.S. 593, 623-24 (1927); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *United States v. Cadena*, 585 F.2d 1252, 1257 (5th

ted outside its territory which are intended to cause and actually do cause an adverse effect within the territory.⁴¹

A corollary of the territorial principle is the law of the flag theory, which governs the jurisdiction of a nation over its ships wherever located.⁴² Although this jurisdictional basis has been treated as falling under the nationality principle,⁴³ the Supreme Court has placed it within the territorial principle.⁴⁴ Thus, a ship is constructively deemed a part of the territory of the sovereign whose flag she flies.⁴⁵

The Supreme Court first applied objective territoriality as a basis of jurisdiction in *Strassheim v. Daily*.⁴⁶ The defendant committed all

Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. King*, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1179 (E.D. Pa. 1980).

41. *Ford v. United States*, 273 U.S. 593, 622-24 (1927); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *United States v. Columba-Colella*, 604 F.2d 356, 358-59 (9th Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1179 (E.D. Pa. 1980); *see* Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965); 1 C. Hyde, *supra* note 17, § 238.

42. *Lauritzen v. Larsen*, 345 U.S. 571, 584-85 (1953); *United States v. Flores*, 289 U.S. 137, 155 (1933); *United States v. Bowman*, 260 U.S. 94, 97 (1922); *United States v. Hayes*, 479 F. Supp. 901, 911-12 (D.P.R. 1979), *aff'd in part, rev'd in part on other grounds*, 653 F.2d 8 (1st Cir. 1981). When a ship is within the territorial jurisdiction of another State, the flag State retains jurisdiction, absent an assertion of jurisdiction by the local sovereign or a controlling treaty provision. *United States v. Flores*, 289 U.S. 137, 159 (1933); *cf. Wildenhuis's Case*, 120 U.S. 1, 18 (1887) (United States treaty with Belgium allows Belgium to assert jurisdiction over crimes committed aboard a United States vessel in Belgian port, if crime is of such a nature as to disturb the public peace).

43. *United States v. Streifel*, 507 F. Supp. 480, 488-89 (S.D.N.Y.), *aff'd*, No. 81-1091, slip op. at 5363 (2d Cir. Nov. 23, 1981); Restatement (Second) of the Foreign Relations Law of the United States §§ 28-29, 31 (1965); *see* W. LaFave and A. Scott, *Handbook on Criminal Law* 109 (1972).

44. *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953); *United States v. Flores*, 289 U.S. 137, 155-57 (1933); *see* *United States v. Bowman*, 260 U.S. 94, 97 (1922).

45. *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953); *United States v. Flores*, 289 U.S. 137, 155 (1933); *see* *United States v. Bowman*, 260 U.S. 94, 97 (1922); *United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980); *United States v. Hayes*, 479 F. Supp. 901, 911 (D.P.R. 1979), *aff'd in part, rev'd in part on other grounds*, 653 F.2d 8, 14-15 (1st Cir. 1981); George, *Extraterritorial Application of Penal Legislation*, 64 Mich. L. Rev. 609, 613 (1966).

46. 221 U.S. 280 (1911). The defendant sold old machinery to the State of Michigan, fraudulently representing that it was new. *Id.* at 282. The governor of Michigan sought to have Daily extradited from Illinois as a fugitive from justice. The district court issued a writ of habeas corpus saying Daily was not subject to the laws of Michigan. *Id.* at 281.

his acts of fraud against the state of Michigan while he was in Illinois.⁴⁷ Justice Holmes, writing for the Court, held that the defendant, Daily, was subject to the laws of Michigan: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."⁴⁸ Although *Strassheim* dealt only with domestic law,⁴⁹ Justice Holmes' enunciation of the objective territorial principle has become the foundation for the United States' use of the principle to assert jurisdiction over acts done outside the country that have the requisite adverse effect within the United States.⁵⁰

When the act proscribed is intended to take effect within the United States but the actual effect does not occur, jurisdiction must be based upon the protective theory of international law.⁵¹ Protective jurisdiction is conferred over acts committed without the State that threaten the security of the State or the operation of its governmental functions.⁵² The concept of protective jurisdiction is justified by the State's need to be able to punish conduct that threatens its very existence.⁵³

47. *Id.* at 285.

48. *Id.* (citations omitted).

49. *Id.* at 281. The defendant was indicted under Michigan law for bribery and obtaining money by false pretenses. *Id.*

50. See, e.g., *Ford v. United States*, 273 U.S. 593, 620-21 (1927); *United States v. Postal*, 589 F.2d 862, 885 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. King*, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Winter*, 509 F.2d 975, 980-81 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rocha v. United States*, 288 F.2d 545, 548-49 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945).

51. *United States v. Columba-Colella*, 604 F.2d 356, 358-59 (5th Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978), *aff'd sub nom. United States v. Arra*, 630 F.2d 836 (1st Cir. 1980).

52. *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978), *aff'd sub nom. United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960) *aff'd in part, rev'd in part on other grounds sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961). But see *Rivard v. United States*, 375 F.2d 882, 885 & n.7 (5th Cir.) (implying injury to national interest is required to invoke the principle), *cert. denied*, 389 U.S. 884 (1967).

53. See *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234-35 (1804); *United States v. Rodriguez*, 182 F. Supp. 479, 491, 494 (S.D. Cal. 1960), *aff'd in part, rev'd in part*

Common-law preference for the territorial basis of jurisdiction,⁵⁴ however, led the United States to make little use of the protective principle,⁵⁵ and the general rule remained that for a State to have jurisdiction the effect of the crime had to be felt within the territory.⁵⁶ What use was made of the principle was in the area of offenses against the sovereign *qua* sovereign.⁵⁷ In other cases where it might have been applied, courts either confused the protective principle with objective territoriality or neglected to assert protective jurisdiction even when it was clearly available.⁵⁸

on other grounds sub nom. *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *G. Mueller & E. Wise, supra* note 26, at 68, 70. In *Rodriguez*, the court stated that "the concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction. . . . [A] crime against the sovereignty of the state, [attacks] the very existence of the state [and] provides authority to Congress to prohibit its commission." 182 F. Supp. at 491-94.

54. 6 M. Whiteman, *supra* note 36, at 97-98; *see United States v. Rodriguez*, 182 F. Supp. 479, 488 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds sub nom.* *Rocha v. United States*, 288 F.2d 545, 548 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *G. Mueller & E. Wise, supra* note 26, at 57.

55. *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978), *aff'd sub nom.* *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); Restatement (Second) of the Foreign Relations Law of the United States § 33 reporter's note (1965); 6 M. Whiteman, *supra* note 36, at 97-98; Dickinson, *supra* note 6, at 543-44. The protective principle was first recognized by the Supreme Court in dictum in *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804). In *Church*, the insurers of a ship put in a non-liability clause for seizure of an American ship by the Portuguese while engaged in illicit trade. *Id.* at 187. The ship was seized off the South American coast by a Portuguese warship. The claimant argued that the seizure was unjustified because the ship was not actually engaged in trade at the time and therefore the insurer should be liable. *Id.* at 232. Upholding the right of the insurers to refuse payment, the Court said a nation's power "to secure itself from injury may certainly be exercised beyond the limits of its territory. . . . Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent." *Id.* at 234-35.

56. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909); *Yenkichi Ito v. United States*, 64 F.2d 73, 75 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933); *United States v. Baker*, 136 F. Supp. 546, 547 (S.D.N.Y. 1955); Address of John Marshall to House of Representatives 12, *reprinted in* 18 U.S. app. 201, 205, 5 Wheat. app. note 1, at 12 (1820).

57. *See United States ex rel. Majka v. Palmer*, 67 F.2d 146, 147 (7th Cir. 1933) (false statements by alien in passport application while outside United States sufficient for jurisdiction); *United States v. Archer*, 51 F. Supp. 708, 709 (S.D. Cal. 1943) (same).

58. *E.g., United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds sub nom.* *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955). In *Rodriguez*, the district court asserted jurisdiction over the defendants' false statements made outside the United States, 182 F. Supp. at 494, as part of a "sham marriage" plan to gain entry into the United States. *Id.* at 482. In asserting jurisdiction, the court confused the objective territorial and protective principles, stating that the former was present when the adverse effect required by

In 1968, the Second Circuit in *United States v. Pizzarusso*⁵⁹ resolved the confusion manifested in prior cases and reaffirmed the distinction between the protective and objective territorial principles.⁶⁰ In *Pizzarusso*, an alien defendant made false statements in Canada when applying for an immigrant visa to enter the United States.⁶¹ The circuit court held that the trial court properly exercised subject matter jurisdiction, despite the absence of any allegation in the indictment that the defendant had entered the country.⁶² Without this allegation, jurisdiction could not be based upon objective territoriality.⁶³ The court found, however, that the crime of falsely filling out application papers constituted "an affront to the very sovereignty of the United States"⁶⁴ and therefore supported an assertion of jurisdiction based upon the protective principle.⁶⁵

Strassheim v. Daily, 221 U.S. 280, 285 (1911), was felt by private persons or their property, but the latter governed where the adverse effect was felt by the sovereign. 182 F. Supp. at 488. By equating *Strassheim* with protective jurisdiction, the court neglected the fundamental distinction between the objective territorial and protective theories; the former requires an actual adverse effect within the State, *see supra* notes 40-41 and accompanying text, the latter requires only a threat directed at the sovereignty of the State. *See supra* notes 51-53 and accompanying text. In *United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955), the issue was whether the district court had jurisdiction to try an alien defendant for falsifying immigration papers while in Canada in order to gain entry into the United States. *Id.* at 547. The court declined to assert jurisdiction, stating that because the crime was "complete the moment she made the false statement," *id.* at 548-49, no acts essential to the offense occurred within the United States, as required by *Strassheim*. *Id.* at 548 (citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)). Clearly, however, protective jurisdiction was present, because the crime posed a threat to a governmental function. *See supra* notes 51-53 and accompanying text.

59. 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968). In this case, the defendant was convicted under a statute that imposed criminal liability upon aliens for committing acts of perjury at United States consulates abroad. The issue on appeal was whether the court had jurisdiction over the offense. *Id.* at 8-10.

60. *Id.* at 10-11. Under the statute in question, entry into the United States was not an element of the offense. Therefore, the court concluded that enforcement had to be based upon the protective principle, which requires that acts done outside a State have a "potentially adverse effect" upon the security or governmental functions of the State. Only if "the statute [were] re-drafted and entry made a part of the crime [would we] be presented with a clear case of jurisdiction under the objective territorial principle." *Id.* at 11.

61. *Id.* at 9. The defendant, Jean Pizzarusso, willfully made a number of false statements in her "Application for Immigrant Visa and Alien Registration" at the American Consulate in Montreal, Canada. Among her false statements was a claim, material to the ultimate disposition of her application, that she had never been arrested. *Id.*

62. *Id.* The defendant did enter the United States after the issuance of her visa, but the court felt this occurrence was immaterial to the question of jurisdiction. *Id.*

63. *Id.* at 11.

64. *Id.* at 10.

65. *Id.* at 11.

In *Pizzarusso*, the requisite threat to the security of the United States was inherent in the very nature of the crime committed.⁶⁶ In high seas narcotics cases, however, the directness of the attack upon security or governmental functions becomes less clear, usually because the vessel seized is hundreds of miles from the United States, is not flying a United States flag and is crewed by foreign nationals.⁶⁷ Most courts applying protective jurisdiction in these cases have done so implicitly, without reference to the sovereignty of the United States,⁶⁸ although there was evidence in each case that the defendant's activity was directed towards the United States.⁶⁹

At least one court, however, has explicitly stated that narcotics smuggling fits squarely within the class of crimes ordinarily covered by the protective principle. In *United States v. Egan*,⁷⁰ alien defendants⁷¹ were charged with conspiracies to import and to possess with the intent to distribute marijuana.⁷² The court based jurisdiction upon the protective principle, stating that "[t]he unlawful importation of drugs bypasses the federal customs laws, and thus directly challenges a governmental function."⁷³ Accordingly, the court held "that the drug laws charged in the indictment do apply to the defendants' activities . . . even though such activities took place solely on the high seas."⁷⁴

66. *Id.* at 9-10. The visa was for entry into the United States. By definition, therefore, it could present a threat to the sovereignty of no other State. *See id.*

67. *E.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1128, 1130 (5th Cir.) (125 to 150 miles, no flag, Colombian crew), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Angola*, 514 F. Supp. 933, 935-36 (S.D. Fla. 1981) (350 miles, no flag, foreign crew); *United States v. Streifel*, 507 F. Supp. 480, 481 (S.D.N.Y.) (200 miles, Panamanian flag, British crew), *aff'd*, No. 81-1091, slip op. at 5363 (2d Cir. Nov. 23, 1981); *United States v. May May*, 470 F. Supp. 384, 392 (S.D. Tex. 1979) (135 miles, no flag, crew not specified).

68. *See, e.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1128-29 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Streifel*, 507 F. Supp. 480, 483-84 (S.D.N.Y.), *aff'd*, No. 81-1091, slip op. at 5363 (2d Cir. Nov. 23, 1981); *United States v. May May*, 470 F. Supp. 384, 394-96 (S.D. Tex. 1979).

69. *United States v. Ricardo*, 619 F.2d 1124, 1127-28 (5th Cir.) (charts marked with rendezvous point off Texas coast), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Streifel*, 507 F. Supp. 480, 482 (S.D.N.Y.) (ship first sighted in Gulf of Maine, 50 miles from United States coast, took evasive action when approached by Coast Guard), *aff'd*, No. 81-1091, slip op. at 5363 (2d Cir. Nov. 23, 1981); *United States v. May May*, 470 F. Supp. 384, 393-94 (S.D. Tex. 1979) (charts marked with rendezvous point off Texas coast).

70. 501 F. Supp. 1252 (S.D.N.Y. 1980). In this case, the Coast Guard boarded a stateless vessel that was approximately 40 miles south of Montauk, Long Island. The crew was arrested after a search of the vessel revealed 30 tons of marijuana in the hold. *Id.* at 1256.

71. *Id.* There were also two American defendants aboard the vessel, over whom jurisdiction existed based upon the nationality principle. *Id.* at 1258.

72. *Id.* at 1256.

73. *Id.* at 1258 (citation omitted).

74. *Id.* at 1261.

In its attempts to control unlawful trafficking in narcotics, Congress has enacted statutes that enable courts to assert jurisdiction within principles of international law.⁷⁵ Courts in their earlier applications of these statutes required a sufficient nexus with the United States to establish objective territorial jurisdiction.⁷⁶ In recent cases, however, courts have relied increasingly upon the protective principle as the sole basis of jurisdiction.⁷⁷ Relaxation of jurisdictional requirements, while enabling courts to punish narcotics smugglers otherwise beyond the reach of United States law, has created the potential for assertions of jurisdiction that exceed the parameters of international law.

II. HIGH SEAS NARCOTICS PROSECUTIONS PRIOR TO SECTION 955a

A. *Inadequacy of the Existing Statutes*

A dramatic increase in high seas narcotics smuggling during the 1970's⁷⁸ led to the realization that the substantive statutes then in force were inadequate as a means to punish smugglers.⁷⁹ These prescriptions are contained in a series of statutes enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁸⁰ Section 841(a)(1) of Title 21 of the United States Code prohibits possession of a controlled substance with the intent that it be distributed, with no requirement as to the ultimate location of the intended

75. See *infra* pt. II (A).

76. *E.g.*, United States v. Postal, 589 F.2d 862, 885 (5th cir.), *cert. denied*, 444 U.S. 832 (1979); United States v. Conroy, 589 F.2d 1258, 1268 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); United States v. Cadena, 585 F.2d 1252, 1257-58 (5th Cir. 1978), *overruled on other grounds en banc*, United States v. Williams, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); United States v. Winter, 509 F.2d 975, 982-83 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

77. *E.g.*, United States v. Caicedo-Asprilla, 632 F.2d 1161, 1166 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1707 (1981); United States v. Ricardo, 619 F.2d 1124, 1128-29 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); United States v. Egan, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980).

78. See House Report, *supra* note 1, at 4; *Coast Guard Drug Interdiction*, *supra* note 1, at 119 (statement of Rear Admiral Norman C. Venzke, U.S. Coast Guard, Chief, Office of Operations, Dep't of Transp.). In 1973, the Coast Guard, in conjunction with other agencies, seized 7 vessels carrying a total of \$4.79 million worth of controlled substances. In 1978, 138 vessels were seized, carrying approximately \$1.2 billion worth of contraband. *Id.*

79. House Report, *supra* note 1, at 4-5; *Coast Guard Drug Interdiction*, *supra* note 1, at 102-03 (statement of Rear Admiral Norman C. Venzke, U.S. Coast Guard, Chief, Office of Operations, Dep't of Transp.); *Coast Guard Drug Law Enforcement*, *supra* note 2, at 34 (statement of Admiral John B. Hayes, Commandant, U. S. Coast Guard).

80. Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections throughout U.S.C.).

distribution.⁸¹ Unlawful importation of a controlled substance into the United States is prohibited by section 952(a) of Title 21;⁸² manufacture or distribution of a controlled substance with the intent or knowledge that it will be unlawfully imported is prohibited under section 959 of the same title.⁸³

The major weakness in these substantive statutes is that they are not directed at the conduct responsible for the increased flow of drugs into the United States—the possession of a large quantity of narcotics on the high seas with the intent that they be distributed within the United States.⁸⁴ Although this type of conduct is proscribed under section 841(a)(1), that statute was not originally intended to have extraterritorial application;⁸⁵ attempts to apply it to vessels on the

81. 21 U.S.C. § 841 (1976). Subsection (a) provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.* § 841(a)(1).

82. 21 U.S.C. § 952(a) (1976). The statute provides in part: "It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance." *Id.*

83. 21 U.S.C. § 959 (1976). The statute proscribes acts of manufacture or distribution committed abroad which are directed at the United States. It states in full: "It shall be unlawful for any person to manufacture or distribute a controlled substance in Schedule I or II—(1) intending that such substance will be unlawfully imported into the United States; or (2) knowing that such substance will be unlawfully imported into the United States. This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia." *Id.*

84. See House Report, *supra* note 1, at 4-6; *Coast Guard Drug Interdiction*, *supra* note 1, at 102-03 (statement of Rear Admiral Norman C. Venzke, U.S. Coast Guard, Chief, Office of Operations, Dep't of Transp.); *Coast Guard Drug Law Enforcement*, *supra* note 2, at 48 (statement of Peter B. Bensinger, Adm'r, Drug Enforcement Administration, U.S. Dept. of Justice).

85. See *Coast Guard Drug Interdiction*, *supra* note 1, at 169 (statement of W. Gordon Fink, Ass't Adm'r for Intelligence, U.S. Dep't of Justice); *Stopping "Mother Ships"—A Loophole in Drug Enforcement: Hearings on S.3437 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 40, 42 (1978) (statement of Peter B. Bensinger, Adm'r, Drug Enforcement Administration, U.S. Dep't of Justice) [hereinafter cited as *Stopping Mother Ships*]. Section 841(a)(1) is included in Title II of the Comprehensive Act, which relates generally to domestic control and enforcement. Pub. L. No. 91-513, tit. II, 84 Stat. 1236 (1970) (codified in scattered sections of 18, 21 & 42 U.S.C.). By contrast § 952(a) and § 963 are contained in Title III of the Act, which relates specifically to export and import of controlled substances. Pub. L. No. 91-513, tit. III, 84 Stat. 1236 (1970) (codified in scattered sections throughout U.S.C.). Although this difference does not preclude extraterritorial application of § 841(a)(1), it is nevertheless relevant as an indication of congressional intent. See *United States v. Gomez-Tostado*, 597 F.2d 170, 172-73 (9th Cir. 1979).

high seas engaged in smuggling have been infrequent and have met with limited success.⁸⁶ Moreover, although section 952(a) must of necessity apply to importation offenses begun extraterritorially,⁸⁷ the section does not become operative until actual importation takes place.⁸⁸ This provision is, therefore, of little use in attempts to apprehend and punish smugglers before their cargo reaches the territorial United States. Unlike sections 841(a)(1) and 952(a), section 959 is expressly intended to have extraterritorial application.⁸⁹ Nevertheless, this statute is also unsuited to high seas narcotics smuggling. In its prohibition of manufacture or distribution of a controlled substance with intent or knowledge that it will be unlawfully imported, the statute has its greatest applicability to acts committed in foreign countries.⁹⁰ On the high seas, however, narcotics are stored in the hold of

86. See *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Baker*, 609 F.2d 134, 135-36 (5th Cir. 1980); *United States v. May May*, 470 F. Supp. 384, 386-87 (S.D. Tex. 1979). In *United States v. May May*, the defendants were arrested approximately 135 miles from the United States and charged with, *inter alia*, a violation of 21 U.S.C. § 841(a)(1) (1976). 470 F. Supp. at 392. At the close of the government's case-in-chief, the court instructed the jury that it would have to return a verdict of not guilty on that charge. *Id.* at 387.

87. *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981); *United States v. Perez-Herrera*, 610 F.2d 289, 290 (5th Cir. 1980); *United States v. Brown*, 549 F.2d 954, 957 (4th Cir.), *cert. denied*, 430 U.S. 949 (1977).

88. See *United States v. Montgomery*, 620 F.2d 753, 758 (10th Cir.), *cert. denied*, 449 U.S. 882 (1980); *United States v. Alfrey*, 620 F.2d 551, 556 (5th Cir.), *cert. denied*, 449 U.S. 938 (1980); *United States v. Soto*, 591 F.2d 1091, 1104 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979). The definition of import for purposes of § 952(a) is contained in § 951(a)(1): "The term 'import' means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States)." 21 U.S.C. § 951(a)(1) (1976). In *Soto*, the defendants were charged with conspiracies to import and to possess with intent to distribute marijuana, as well as actual importation and possession with intent to distribute. 591 F.2d at 1094. The court reversed the convictions for conspiracy to import and actual importation because the evidence was insufficient to show the marijuana had been brought into the United States from without the territory. *Id.* at 1104-05.

89. 21 U.S.C. § 959 (1976); see *United States v. King*, 552 F.2d 833, 850-52 & n.24 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Egan*, 501 F. Supp. 1252, 1260 (S.D.N.Y. 1980).

90. See, e.g., *United States v. King*, 552 F.2d 833, 850-52 (9th Cir. 1976) (American nationals convicted of violating § 959 while in Thailand and Japan), *cert. denied*, 430 U.S. 966 (1977); *United States v. Hayes*, 479 F. Supp. 901, 910 (D.P.R. 1979) ("[s]ection 959, however, was enacted to encompass acts committed in *foreign countries* obviously under the theory of protective jurisdiction" (emphasis in original)), *aff'd in part, rev'd in part on other grounds*, 653 F.2d 8 (1st Cir. 1981); *United States v. Daniszewski*, 380 F. Supp. 113, 115-16 (E.D.N.Y. 1974) (United States national indicted for distribution of controlled substance in Thailand; motion to dismiss denied).

a ship; the act of manufacture has been completed and there are no acts of distribution taking place.⁹¹

The difficulties with existing substantive narcotics statutes forced prosecutors to charge conspiracies to commit these offenses in order to be able to punish narcotics smugglers.⁹² Section 846 of Title 21 prohibits conspiracies to possess a controlled substance with intent to distribute.⁹³ With identical language, section 963 of Title 21 prohibits conspiracies to import a controlled substance and to manufacture or distribute it with the intent or knowledge that it will be unlawfully imported.⁹⁴

For the government to obtain a conviction for conspiracy to commit a narcotics offense, all that need be shown is that the conspirators had agreed to commit an offense⁹⁵ and had the culpable mental state required for the underlying offense.⁹⁶ Under sections 846 and 963, therefore, the government must prove that the defendants had intent or knowledge that their acts take effect within the United States.⁹⁷ It

91. *Stopping Mother Ships*, *supra* note 85, at 42 (statement of Peter B. Bensinger, Adm'r, Drug Enforcement Adm'n, U.S. Dep't of Justice).

92. House Report, *supra* note 1, at 5; *Coast Guard Drug Law Enforcement*, *supra* note 2, at 32 (statement of Hon. Benjamin A. Gilman); *id.* at 34 (statement of Admiral John B. Hayes, Commandant, U.S. Coast Guard, Dep't of Transp.); *id.* at 60-64 (statement of Michael P. Sullivan, Ass't U.S. Att'y, Chief, Crim. Div., S.D. Fla.); *e.g.*, *United States v. Postal*, 589 F.2d 862, 865 (5th Cir.) (§§ 846, 963), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1256 (5th Cir. 1978) (§§ 846, 963), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. Warren*, 578 F.2d 1058, 1061 (5th Cir. 1978) (*en banc*) (§ 963), *cert. denied*, 446 U.S. 956 (1980); *United States v. Winter*, 509 F.2d 975, 977 (5th Cir.) (§ 963), *cert. denied*, 423 U.S. 825 (1975).

93. 21 U.S.C. § 846 (1976). This statute proscribes attempts or conspiracies to violate 21 U.S.C. § 841(a)(1)(1976). It provides in full: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (1976).

94. 21 U.S.C. § 963 (1976). This statute proscribes attempts or conspiracies to violate, *inter alia*, 21 U.S.C. §§ 952(a), 959 (1976): "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 963 (1976).

95. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Ingram v. United States*, 360 U.S. 672, 677-78 (1959); *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); *United States v. Bright*, 550 F.2d 240, 241 (5th Cir. 1977).

96. *See Ingram v. United States*, 360 U.S. 672, 678 (1959); *United States v. McMahon*, 592 F.2d 871, 873 & n.3 (5th Cir. 1979); *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (*en banc*), *cert. denied*, 444 U.S. 846 (1979); *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979).

97. *See, e.g.*, *United States v. Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981); *United States v. Hayes*, 653 F.2d 8, 13 (1st Cir. 1981); *United States v. DeWeese*, 632

is not necessary that the underlying substantive offense be completed.⁹⁸ Thus, the government may charge a conspiracy to violate sections 841(a)(1), 952(a) or 959 and obtain a conviction without showing that the possession, importation, manufacture or distribution proscribed by those statutes has occurred.⁹⁹ By taking advantage of the lesser standard that must be met for a conspiracy offense rather than proving the underlying substantive offense, the government has been able to punish high seas narcotics smugglers for possession of narcotics with the intent to distribute.¹⁰⁰

B. *Relaxation of Substantive and Jurisdictional Requirements*

The narcotics conspiracy statutes, sections 846 and 963, differ from the general federal conspiracy statute¹⁰¹ in that they do not explicitly

F.2d 1267, 1271 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981); *United States v. Arra*, 630 F.2d 836, 840 (1st Cir. 1980); *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 994 (1981); *United States v. Baker*, 609 F.2d 134, 139 (5th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 885 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *United States v. May May*, 470 F. Supp. 384, 396 (S.D. Tex. 1979).

98. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *United States v. Schmucker-Bula*, 609 F.2d 399, 401 (7th Cir. 1980); *United States v. Waldron*, 590 F.2d 33, 34 (1st Cir.), *cert. denied*, 441 U.S. 934 (1979); *United States v. Fruehauf Corp.*, 577 F.2d 1038, 1071 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. McKnight*, 439 F. Supp. 536, 539 (E.D. Pa. 1977).

99. *See United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980); *United States v. Ricardo*, 619 F.2d 1124, 1128 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 994 (1981); *United States v. Schmucker-Bula*, 609 F.2d 399, 401 (7th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 885-86 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Conroy*, 589 F.2d 1258, 1269-70 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); *United States v. May May*, 470 F. Supp. 384, 395 (S.D. Tex. 1979).

100. *See, e.g., United States v. Freeman*, 660 F.2d 1030, 1037 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1273 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981); *United States v. Caicedo-Asprilla*, 632 F.2d 1161, 1171 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1707 (1981); *United States v. Ricardo*, 619 F.2d 1124, 1132 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 994 (1981); *United States v. Postal*, 589 F.2d 862, 891 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1266 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. Winter*, 509 F.2d 975, 991 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

101. 18 U.S.C. § 371 (1976). The conspiracy statute proscribes conspiracies to commit federal offenses or to defraud the United States. It provides in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy." *Id.* (emphasis added).

require the government to allege or prove as an essential element of the offense that an overt act in furtherance of the conspiracy was committed by a conspirator.¹⁰² Nevertheless, many courts proceeded on the assumption that an overt act was required,¹⁰³ while others, although acknowledging that an overt act was not required, found that one had occurred.¹⁰⁴

In *United States v. Rodriguez*,¹⁰⁵ the Fifth Circuit attempted to resolve the confusion surrounding interpretation of the two conspiracy statutes. The appellants in *Rodriguez* were convicted of conspiracies to import and to possess with intent to distribute marijuana.¹⁰⁶ They were operating out of Florida as part of a plan to smuggle marijuana into the United States from Colombia.¹⁰⁷ The conviction for conspiracy to import was based upon direct evidence of meetings between the conspirators and undercover agents of the Drug Enforcement Administration.¹⁰⁸ The distribution conspiracy was proven by circumstantial evidence; the tremendous amount of marijuana being imported allowed an inference that it was intended for distribution.¹⁰⁹ The Fifth Circuit, sitting en banc, rejected appellants' contentions that the

102. Compare 18 U.S.C. § 371 (1976) (overt act required) with 21 U.S.C. § 846 (1976) (no such requirement) and 21 U.S.C. § 963 (1976) (same).

103. E.g., *United States v. Schmucker-Bula*, 609 F.2d 399, 402 (7th Cir. 1980); *United States v. Byers*, 600 F.2d 1130, 1133 (5th Cir. 1979); *United States v. Dominguez*, 604 F.2d 304, 308 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *United States v. Winter*, 509 F.2d 975, 982-83 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Lawson*, 507 F.2d 433, 445 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

104. E.g., *United States v. Postal*, 589 F.2d 862, 886-87 & n.39 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Thomas*, 567 F.2d 638, 641 (5th Cir.), *cert. denied*, 439 U.S. 822 (1978); *United States v. Dryer*, 533 F.2d 112, 117 (3d Cir. 1976).

105. 612 F.2d 906 (5th Cir. 1980) (en banc), *aff'd sub nom.* *Albernaz v. United States*, 450 U.S. 333 (1981).

106. *United States v. Rodriguez*, 585 F.2d 1234, 1238 (5th Cir. 1978), *aff'd in part, rev'd in part on other grounds en banc*, 612 F.2d 906 (5th Cir. 1980), *aff'd sub nom.* *Albernaz v. United States*, 450 U.S. 333 (1981).

107. *Id.* at 1238-39. The appellants in *Rodriguez* were involved in the onshore activities of the importation and distribution scheme. *Id.* The conspirators who were bringing the marijuana from Colombia were arrested on the high seas, tried separately from the *Rodriguez* appellants and convicted. Their convictions were affirmed in *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980).

108. *United States v. Rodriguez*, 585 F.2d 1234, 1238, 1245 (5th Cir. 1978), *aff'd in part, rev'd in part on other grounds en banc*, 612 F.2d 906 (5th Cir. 1980), *aff'd sub nom.* *Albernaz v. United States*, 450 U.S. 333 (1981). The appellants' conspiracy had been infiltrated by agents of the Drug Enforcement Administration, who represented to appellants that the agents could secure a vessel to enable them to transport marijuana. *Id.* at 1238. The importation plans were made at a series of meetings between the agents and appellants. *Id.*

109. *Id.* at 1246.

consecutive sentences imposed for the convictions were improper.¹¹⁰ In resolving the confusion shown in prior cases as to whether allegation and proof of an overt act is an essential element of a narcotics conspiracy offense, the court expressly held that "these indictments do not require allegation or proof of an overt act."¹¹¹

An overt act itself is considered evidence of the conspiracy¹¹²—an agreement between two or more persons to commit an offense.¹¹³ In the absence of an overt act requirement, the existence of the agreement must be established through other direct or circumstantial evidence.¹¹⁴ Mere presence at the scene of a crime is generally not considered sufficient to support a conspiracy conviction;¹¹⁵ the accused's participation must be established by evidence eliminating any reasonable hypothesis of innocence.¹¹⁶ In many high seas narcotics conspiracies, the absence of an overt act requirement has been compensated for by other evidence such as incriminating statements by defendants,¹¹⁷ jettisoning of charts and papers after contact with the

110. *United States v. Rodriguez*, 612 F.2d 906, 925 (5th Cir. 1980) (en banc), *aff'd sub nom. Albarnaz v. United States*, 450 U.S. 333 (1981).

111. *Id.* at 919 n.37 (emphasis in original).

112. *Yates v. United States*, 354 U.S. 298, 334 (1957); *United States v. Gonzales*, 617 F.2d 1358, 1364 (9th Cir. 1980); *United States v. Nowak*, 448 F.2d 134, 139-40 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

113. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *United States v. Civella*, 648 F.2d 1167, 1174 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3249 (U.S. Oct. 5, 1981); *United States v. Boone*, 641 F.2d 609, 611 (8th Cir. 1981); *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980); *United States v. Bailey*, 607 F.2d 237, 243 (9th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *United States v. Teal*, 582 F.2d 343, 345 (5th Cir. 1978); *see supra* note 95 and accompanying text.

114. *See Hamling v. United States*, 418 U.S. 87, 124 (1974); *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 846 (1979); *United States v. Rodriguez*, 585 F.2d 1234, 1245, 1246 (5th Cir. 1978), *aff'd in part, rev'd in part on other grounds en banc*, 612 F.2d 906 (5th Cir. 1980), *aff'd sub nom. Albarnaz v. United States*, 450 U.S. 333 (1981).

115. *United States v. Dalzotto*, 603 F.2d 642, 645 (7th Cir. 1979); *United States v. Soto*, 591 F.2d 1091, 1104 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979); *United States v. Littrell*, 574 F.2d 828, 833 (5th Cir. 1978).

116. *United States v. DeSimone*, 660 F.2d 532, 537 (5th Cir. 1981); *United States v. Butler*, 611 F.2d 1066, 1072 (5th Cir. 1980); *United States v. Barrentine*, 591 F.2d 1069, 1083 (5th Cir. 1979); *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 846 (1979); *see United States v. Calcedo-Asprilla*, 632 F.2d 1161, 1166 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1707 (1981); *United States v. Rodriguez*, 585 F.2d 1234, 1245 (5th Cir. 1978), *aff'd in part, rev'd in part on other grounds en banc*, 612 F.2d 906 (5th Cir. 1980), *aff'd sub nom. Albarnaz v. United States*, 450 U.S. 333 (1981); *United States v. Brown*, 584 F.2d 252, 262 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

117. *See, e.g., United States v. Mann*, 615 F.2d 668, 670 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 994 (1981); *United States v. Conroy*, 589 F.2d 1258, 1271 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); *United States v. Thomas*, 567 F.2d 638, 640 (5th Cir.), *cert. denied*, 439 U.S. 822 (1978).

Coast Guard,¹¹⁸ or participation in the transfer of narcotics.¹¹⁹ Thus, in *United States v. Thomas*,¹²⁰ the circuit court, while acknowledging that an overt act is not required under section 963 for a conspiracy to import marijuana,¹²¹ concluded that fourteen meetings between the defendants and undercover DEA agents were abundant evidence of the existence of a conspiracy.¹²²

Recent decisions, however, have affirmed high seas narcotics conspiracy convictions while nearly abandoning traditional conspiracy theory and making presence on a ship laden with narcotics sufficient evidence on which to base a conspiracy conviction. *United States v. DeWeese*¹²³ and *United States v. Freeman*¹²⁴ were two prosecutions arising out of the seizure of a United States-registered vessel.¹²⁵ The captain of the vessel, DeWeese, and the crew members were convicted in separate trials under section 963 of conspiracy to import marijuana into the United States in violation of section 952(a).¹²⁶

On his appeal, Captain DeWeese argued that there was insufficient evidence to establish his participation in a conspiracy.¹²⁷ Rejecting this contention, the court stated that the probable length of the voyage, the large quantity of marijuana on board, and the necessarily close relationship of the captain and crew were factors from which the jury could find guilt beyond a reasonable doubt.¹²⁸ The court ac-

118. See, e.g., *United States v. Ricardo*, 619 F.2d 1124, 1127 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Postal*, 589 F.2d 862, 866 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

119. See, e.g., *United States v. Caicedo-Asprilla*, 632 F.2d 1161, 1167 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1707 (1981); *United States v. Cadena*, 585 F.2d 1252, 1265 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980).

120. 567 F.2d 638 (5th Cir.), *cert. denied*, 439 U.S. 822 (1978).

121. *Id.* at 641.

122. *Id.* at 640.

123. 632 F.2d 1267 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981).

124. 660 F.2d 1030 (5th Cir. 1981).

125. The vessel was boarded for a routine safety inspection near the Straits of Yucatan, 250 miles from the United States. 632 F.2d at 1269. The ship was rigged for shrimping, yet the gear appeared unused. When asked if the Coast Guard could examine the hold of the ship, DeWeese replied, "Sure, but you're not going to like what you find." The inspection revealed over 41,000 pounds of marijuana. *Id.*

126. *United States v. Freeman*, 660 F.2d 1030, 1031 (5th Cir. 1981) (crew members); *United States v. DeWeese*, 632 F.2d 1267, 1268-69 (5th Cir. 1980) (DeWeese), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981).

127. 632 F.2d at 1269. DeWeese also argued that the district court lacked jurisdiction because there was no evidence that the agreement to conspire or any overt act occurred within the United States. *Id.* at 1271. The court rejected this argument, saying proof that the conspiracy was directed at the United States was sufficient to give the court jurisdiction. *Id.* at 1271-72.

128. *Id.* at 1272 (citing *United States v. Alfrey*, 620 F.2d 551, 556 (5th Cir.), *cert. denied*, 449 U.S. 938 (1980)).

cepted the government's argument that no one would attempt to smuggle eight million dollars worth of marijuana from Colombia into the United States without prearranged assistance.¹²⁹

In the *Freeman* trial, the crew of the ship also argued that there was insufficient evidence upon which to base a conspiracy conviction.¹³⁰ The *Freeman* court, however, rejected this argument and in affirming the conspiracy conviction¹³¹ extended the holding of *DeWeese*. The evidence showed that the defendant crew members were not informed by Captain DeWeese of the purpose of their voyage until after they had left United States territory.¹³² There was thus no evidence of a conspiracy being formed by these defendants while in the United States or at sea. The court inferred the existence of a conspiracy from the three factors discussed in *DeWeese*¹³³ and held that the three were sufficient in themselves to establish a prima facie case of conspiracy.¹³⁴

The ramifications of these holdings were the focus of a special concurrence by Chief Judge Godbold who wrote that, after *DeWeese*, "every officer and every crewman on every fishing and shrimping boat that makes a 'long voyage' . . . in the Gulf or Atlantic is now prima facie a conspirator if a large quantity of contraband is found aboard the vessel."¹³⁵ Thus, despite clear precedent to the contrary,¹³⁶ *DeWeese* and *Freeman* would allow participation in the conspiracy to be inferred from mere presence and knowledge.

Paralleling the relaxation of the substantive standards necessary for a conspiracy offense was a trend towards abolition of the overt act as a requirement for subject matter jurisdiction. Prior to this shift, an overt act within the United States was either assumed to be required or, although not required, was found to be present.¹³⁷ Courts thus relied on objective territorial jurisdiction, either by itself,¹³⁸ or in

129. *Id.*

130. 660 F.2d at 1034.

131. *Id.* at 1037.

132. *Id.* at 1032.

133. *Id.* at 1035. The three factors were the probable length of the voyage, the large quantity of marijuana aboard the ship and the necessarily close relationship between captain and crew. *United States v. DeWeese*, 632 F.2d 1267, 1272 (5th Cir. 1980) (citing *United States v. Alfrey*, 620 F.2d 551, 556 (5th Cir.), *cert. denied*, 449 U.S. 938 (1980)), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981).

134. 660 F.2d at 1035-36.

135. *Id.* at 1038 (Godbold, C.J., concurring).

136. See *supra* notes 114-16 and accompanying text.

137. See *supra* notes 103-04 and accompanying text.

138. See, e.g., *United States v. Postal*, 589 F.2d 862, 885 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Cadena*, 585 F.2d 1252, 1258 (5th Cir. 1978), *overruled on other grounds en banc*, *United States v. Williams*, 617 F.2d 1063, 1078 n.18 (5th Cir. 1980); *United States v. Winter*, 509 F.2d 975, 980 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

conjunction with nationality¹³⁹ or law of the flag jurisdiction.¹⁴⁰ With the abolition of the overt act as a jurisdictional requirement, however, came a willingness to rely upon the protective principle as the sole basis of jurisdiction in high seas narcotics cases.¹⁴¹

In *United States v. Williams*,¹⁴² the defendant appealed his conviction under section 963 for conspiracy to import marijuana, arguing that the district court lacked jurisdiction over the offense because no overt act had occurred within the United States.¹⁴³ The defendant's Panamanian ship was first spotted in Colombian waters and was subsequently boarded in international waters. A search of the hold revealed 21,680 pounds of marijuana.¹⁴⁴ The Fifth Circuit rejected Williams' argument, holding "that proof of an overt act within the judicial district is not a prerequisite for district court jurisdiction. Any other result would have the anomalous requirement that more be shown for jurisdiction than is necessary for conviction of the crime."¹⁴⁵ During the pendency of a rehearing of *Williams*,¹⁴⁶ the Fifth Circuit in *United States v. Postal*¹⁴⁷ affirmed three convictions

139. See, e.g., *United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1268 (5th Cir.), cert. denied, 444 U.S. 831 (1979); *United States v. Winter*, 509 F.2d 975, 980 (5th Cir.), cert. denied, 423 U.S. 825 (1975).

140. See, e.g., *United States v. Hayes*, 653 F.2d 8, 11 (1st Cir. 1981); *United States v. Winter*, 509 F.2d 975, 977 (5th Cir.), cert. denied, 423 U.S. 825 (1975).

141. See *United States v. Caicedo-Asprilla*, 632 F.2d 1161, 1166 (5th Cir. 1980), cert. denied, 101 S. Ct. 1707 (1981); *United States v. Ricardo*, 619 F.2d 1124, 1128-29 (5th Cir.), cert. denied, 449 U.S. 1063 (1980); *United States v. Cortes*, 588 F.2d 106, 107 (5th Cir. 1979); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980); *United States v. May May*, 470 F. Supp. 384, 396 (S.D. Tex. 1979).

142. 589 F.2d 210 (5th Cir. 1979), *aff'd en banc*, 617 F.2d 1063 (5th Cir. 1980).

143. *Id.* at 213.

144. *Id.* at 212. The ship was boarded by the Coast Guard only after receipt of permission to do so from the Panamanian Embassy. *Id.*

145. *Id.* at 213. Although it may have been anomalous for this court to require more for jurisdiction than for the substantive offense, it is not incorrect in terms of international law. Before a State may prosecute and convict for an offense, it must have an accepted basis of international jurisdiction for doing so. See *supra* note 13 and accompanying text. Thus, if an American national is murdered in France by a French national, this certainly constitutes murder under American law. Yet there is no international basis of jurisdiction over the offense, because the United States rejects the passive personality principle. See *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979); *supra* note 36 and accompanying text.

146. Williams filed petitions for a rehearing and a rehearing en banc; the petition for rehearing en banc was granted on July 16, 1979. *United States v. Williams*, 600 F.2d 18 (5th Cir. 1979) (en banc). Upon rehearing, the Fifth Circuit affirmed Williams' conviction. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc).

147. 589 F.2d 862 (5th Cir.), cert. denied, 444 U.S. 832 (1979).

under sections 846 and 963 for conspiracy to import marijuana and conspiracy to possess it with intent to distribute.¹⁴⁸ In *Postal*, the defendants' foreign-registered vessel had been seized in international waters;¹⁴⁹ they argued that the court lacked jurisdiction over the offense.¹⁵⁰ The court said overt acts that had occurred within the United States gave objective territorial jurisdiction,¹⁵¹ then added in dictum that the result of recent conspiracy decisions could well be "that the proof of an overt act within the United States is no longer required for jurisdictional purposes and that mere proof of intended territorial effects is sufficient."¹⁵²

The significance of the decisions in *Williams* and *Postal* is in the willingness to base jurisdiction over high seas narcotics offenses upon the protective principle. Proof of intended territorial effects, which was required as an essential element of all the substantive and conspiracy statutes,¹⁵³ would thus also serve as the sole basis of international subject matter jurisdiction.¹⁵⁴ Such became evident in *United States v. May May*,¹⁵⁵ in which the alien defendants' stateless vessel was seized on the high seas 135 miles from the United States coast.¹⁵⁶ It

148. *Id.* at 865.

149. *Id.* at 867-68. The defendants' vessel was boarded twice by the Coast Guard in order to ascertain her nationality. The first boarding took place 10.5 miles from the United States coast. *Id.* at 866. When the defendants produced a Grand Cayman registry, the Coast Guard withdrew. *Id.* at 867. After consultation with officials in Miami, the Coast Guard officers boarded again, this time seizing the vessel and arresting the crew. *Id.* at 867-68.

150. *Id.* at 885.

151. *Id.* at 886-87. The indictment alleged the purchase of the ship in Florida as an overt act under both conspiracy counts. *Id.* at 886. The court rejected defendants' argument that the conspiracy had not been formed when the ship was purchased. *Id.* at 887. Defendants' setting sail for South America the day after the ship was delivered ruled out any reasonable hypothesis that the ship was bought for innocent purposes. *Id.*

152. *Id.* at 886 n.39.

153. This requirement was either present in the statute itself, *see supra* notes 83, 93-94, or, as in the case of 21 U.S.C. § 841(a)(1) (1976), was imposed judicially. *E.g.*, *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Baker*, 609 F.2d 134, 138-39 (5th Cir. 1980).

154. *E.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Perez-Herrera*, 610 F.2d 289, 292 (5th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 885 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Williams*, 589 F.2d 210, 213 (5th Cir. 1979), *aff'd en banc*, 617 F.2d 1063 (5th Cir. 1980); *see United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (per curiam) (dictum), *cert. denied*, 450 U.S. 994 (1981); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980) (dictum). *But see United States v. Baker*, 609 F.2d 134, 139 (5th Cir. 1980) (concluding that question still open as to whether mere proof of intended territorial effects is sufficient for district court jurisdiction).

155. 470 F. Supp. 384 (S.D. Tex. 1979).

156. *Id.* at 392.

had never entered United States waters,¹⁵⁷ and no overt acts within the United States had taken place.¹⁵⁸ The court denied the defendants' motion to dismiss the indictments,¹⁵⁹ which charged conspiracy to import marijuana and conspiracy to possess it with intent to distribute.¹⁶⁰ That all the events in the conspiracy occurred outside the territorial United States was held to be irrelevant to the question of a court's jurisdiction as long as the government could demonstrate that the extraterritorial acts were intended to have an impact within the United States.¹⁶¹ The intended territorial effects were established through charts marked with a rendezvous point off the coast of Texas and the evasive actions that were taken by the defendants' vessel after contact with the Coast Guard.¹⁶² The court said that its holding fully comported with the somewhat expansive viewpoint of jurisdiction adopted by the Fifth Circuit in narcotics conspiracies, believing, as did the *Williams* court, that to require more for jurisdiction than for the substantive offense would be anomalous.¹⁶³

In *United States v. Ricardo*,¹⁶⁴ the court extended the protective principle even further than had the *May May* court. The defendants in *Ricardo* were five Colombian nationals¹⁶⁵ arrested aboard a stateless vessel approximately 125 to 150 miles from the Texas coast.¹⁶⁶ Their convictions on conspiracy charges under section 963 were upheld, though no overt acts within or without the United States were alleged or proved.¹⁶⁷ The court claimed it had objective territorial jurisdiction,¹⁶⁸ but clearly it was basing jurisdiction on a very broad assertion of the protective principle.¹⁶⁹ The only proof of intended

157. *Id.* at 394.

158. *Id.*

159. *Id.* at 396.

160. *Id.* at 386.

161. *Id.* at 395.

162. *Id.* at 394-96.

163. *Id.*; see *supra* note 145 and accompanying text.

164. 619 F.2d 1124 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

165. *Id.* at 1126. There were two United States nationals aboard the vessel, as to whom nationality jurisdiction was also present. See *id.* at 1127.

166. *Id.* at 1128.

167. *Id.* The circumstances of the case, including charts seized when the vessel was boarded, indicated the plan was conceived outside the United States. *Id.* at 1127.

168. *Id.* at 1128-29. The court reiterated that the United States traditionally adheres to the objective territorial principle, which requires an overt act within the territory for jurisdiction. *Id.* at 1128. The court stated, however, that it would contravene the purpose of the narcotics statutes if they applied extraterritorially only when an overt act occurred within the territory. *Id.* at 1129. The court thus said "[t]he fact that appellants intended the conspiracy to be consummated within the territorial boundaries satisfies jurisdictional requisites." *Id.*

169. See *id.* at 1128-29.

territorial effects consisted of charts marked with a rendezvous point in international waters sixty miles outside United States territory.¹⁷⁰

Analysis of the foregoing cases reveals a steady lessening of the evidence considered necessary both for conspiracy offenses and for subject matter jurisdiction. Often in these cases some overt act or adverse effect within the United States, though not required, has been present,¹⁷¹ thus conferring objective territorial jurisdiction upon the court. In other cases, the nationality of the defendant¹⁷² or the United States registry of the ship¹⁷³ has provided an additional basis of international subject matter jurisdiction. When no such act or effect has been shown, or one of the other international principles has not been applicable, protective jurisdiction has always been present because the applicable statutes all require as an essential element of the offense that the act proscribed be directed at the United States.¹⁷⁴

With the enactment of section 955a(a) of Title 21, however, Congress has proscribed possession with intent to distribute, regardless of the location of the intended distribution or the nationality of the accused.¹⁷⁵ This statute, therefore, differs from existing statutes by purporting to confer jurisdiction upon the federal court without any allegation or proof whatsoever that the distribution proscribed is to have an effect within the United States.

III. THE JURISDICTIONAL DEFECT CONTAINED IN SECTION 955a(a)

The legislative history of section 955a of Title 21 of the United States Code¹⁷⁶ indicates that the statute was originally intended to

170. *Id.* at 1127.

171. *See supra* notes 103-04 and accompanying text.

172. *E.g.*, *United States v. Mann*, 615 F.2d 668, 670 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *United States v. Perez-Herrera*, 610 F.2d 289, 289 (5th Cir. 1980); *United States v. Baker*, 609 F.2d 134, 135 (5th Cir. 1980); *United States v. Cortes*, 588 F.2d 106, 108 (5th Cir. 1979); *United States v. Winter*, 509 F.2d 975, 977 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Streifel*, 507 F. Supp. 480, 481 (S.D.N.Y.), *aff'd*, No. 81-1091, slip op. at 5363 (2d Cir. Nov. 23, 1981).

173. *See, e.g.*, *United States v. Freeman*, 660 F.2d 1030, 1031 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1269 (5th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981); *United States v. Mann*, 615 F.2d 668, 669 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 994 (1981); *United States v. Perez-Herrera*, 610 F.2d 289, 289 (5th Cir. 1980); *United States v. Baker*, 609 F.2d 134, 135-36 (5th Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1262 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979); *United States v. Warren*, 578 F.2d 1058, 1061 (5th Cir. 1978) (*en banc*), *cert. denied*, 446 U.S. 956 (1980); *United States v. Winter*, 509 F.2d 975, 977 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Hayes*, 479 F. Supp. 901, 905 (D.P.R. 1979), *aff'd in part, rev'd in part on other grounds*, 653 F.2d 8 (1st Cir. 1981).

174. *See supra* notes 83, 93-94, 153 and accompanying text.

175. 21 U.S.C.A. § 955a(a) (West Supp. 1981).

176. 21 U.S.C.A. § 955a (West Supp. 1981). The statute provides in pertinent part: "(a) It is unlawful for any person on board a vessel of the United States, or on

apply only to possession of narcotics by United States nationals or by any national aboard vessels registered in the United States.¹⁷⁷ During the hearings on the proposed statute, however, testimony was heard regarding the difficulty of prosecuting the foreign crew members of stateless vessels who were engaged in narcotics smuggling.¹⁷⁸ Despite the relaxation of the substantive and jurisdictional requirements needed for conviction under existing statutes,¹⁷⁹ those statutes all required proof of intended territorial effects.¹⁸⁰ Because of the difficulty of proving such intent, many indictments were thrown out, and although the narcotics were destroyed and the ships impounded, the smugglers themselves went free.¹⁸¹ As a result of these hearings, section 955a, as enacted, is far broader than its sponsors had originally planned.¹⁸²

Though Congress intended to give "maximum prosecutorial authority under international law"¹⁸³ by enacting section 955a, nowhere did it manifest a desire to override established principles of international law.¹⁸⁴ Indeed, the legislative history of the statute is evidence of

board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance—(1) intending that it be unlawfully imported into the United States; or (2) knowing that it will be unlawfully imported into the United States." *Id.*

177. House Report, *supra* note 1, at 4-5; *Coast Guard Drug Interdiction*, *supra* note 1, at 273-79; see *Coast Guard Drug Law Enforcement*, *supra* note 2, at 29 (statement of Hon. Benjamin A. Gilman); *Coast Guard Drug Interdiction*, *supra* note 1, at 102-03 (statement of Rear Admiral Norman C. Venzke, U.S. Coast Guard, Chief, Office of Operations, Dep't of Transp.).

178. House Report, *supra* note 1, at 5; *Coast Guard Drug Law Enforcement*, *supra* note 2, at 48 (statement of Peter B. Bensinger, Adm'r, Drug Enforcement Adm'n, U.S. Dep't of Justice), *id.* at 55 (statement of Morris D. Busby, Dir., Office of Ocean Affairs, OES Bureau, U.S. Dep't of State).

179. See *supra* pt. II(B).

180. *Coast Guard Drug Law Enforcement*, *supra* note 2, at 60 (statement of Michael P. Sullivan, Ass't U.S. Att'y, Chief, Crim. Div., S.D. Fla.).

181. S. Rep. No. 855, 96th Cong., 2d Sess. 2 (1980); House Report, *supra* note 1, at 5; *Coast Guard Drug Law Enforcement*, *supra* note 2 at 65 (statement of Michael P. Sullivan, Ass't U.S. Att'y, Chief, Crim. Div., S.D. Fla.).

182. Compare 21 U.S.C.A. § 955a(a) (West Supp. 1981) (proscribes possession of a controlled substance by a foreign national aboard a stateless vessel on the high seas) with H.R. 10371, 95th Cong., 1st Sess., 123 Cong. Rec. 39,113 (1977) (no such proscription), reprinted in *Coast Guard Drug Interdiction*, *supra* note 1, at 273, and H.R. 10698, 95th Cong., 2d Sess., 124 Cong. Rec. 1,894 (1978) (same), reprinted in *Coast Guard Drug Interdiction*, *supra* note 1, at 276.

183. S. Rep. No. 855, 96th Cong., 2d Sess. 2 (1980).

184. See *supra* note 21 and accompanying text.

congressional intent to abide by that law.¹⁸⁵ Section 955a must therefore be construed within established principles of international subject matter jurisdiction.¹⁸⁶

In enacting section 955a(a), Congress has created a statute that is far easier for courts and prosecutors to apply in high seas narcotics cases than are the statutes previously used in these situations. As section 955a is expressly intended to have extraterritorial application,¹⁸⁷ courts no longer have to engage in the tortuous analysis necessary to infer that application in earlier prosecutions under the conspiracy statutes.¹⁸⁸ Removal of the requirement of showing intent to distribute or import into the United States allows prosecutors to avoid allegation and proof of intended territorial effects.¹⁸⁹ By omitting this requirement, however, Congress has removed the essential element of prior statutes which permitted courts to base their holdings upon protective jurisdiction.¹⁹⁰ Such an omission creates the possibility that section 955a(a) may be applied in a manner that exceeds the limits of that jurisdiction.

The majority of vessels seized while engaged in narcotics smuggling are of United States registry.¹⁹¹ In these cases, application of section 955a(a) presents no international legal problems because jurisdiction

185. House Report, *supra* note 1, at 9; *Coast Guard Drug Law Enforcement*, *supra* note 2, at 10, 13-14 (Letter from Patricia M. Wald, Ass't Att'y Gen., U.S. Dep't of Justice, to Hon. John M. Murphy, Chm'n, House Comm. on Merchant Marine and Fisheries (Apr. 11, 1979)), *id.* at 16-18 (Letter from Mark G. Aron, Acting Gen. Counsel, U.S. Dep't of Transp., to Hon. John M. Murphy, Chm'n, House Comm. on Merchant Marine and Fisheries (Apr. 20, 1979)). The proposed bill to which these letters referred, H.R. 2538, included foreign vessels in the category of "vessels subject to the jurisdiction of the United States." Each letter pointed out that the United States does not possess that type of jurisdiction under international law. *Id.* at 11, 17. As a result of these letters, the proposed bill was amended, but no requirement that distribution be intended for the United States was inserted.

186. *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981).

187. 21 U.S.C.A. § 955a(h) (West Supp. 1981). Subsection (h) expressly provides that § 955a "is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States." *Id.*

188. *See, e.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1128-29 (5th Cir.) (inferring extraterritorial application for §§ 846 and 963), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Perez-Herrera*, 610 F.2d 289, 290-91 (5th Cir. 1980) (same for § 963); *United States v. Egan*, 501 F. Supp. 1252, 1258-60 (S.D.N.Y. 1980) (same for §§ 841(a)(1), 846, 952(a) and 963); *cf. United States v. Layton*, 509 F. Supp. 212, 216-21 (N.D. Cal.) (extraterritoriality inferred from statute proscribing conspiracy to murder or to aid and abet murder of United States Congressman), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 101 S. Ct. 3128 (1981).

189. *United States v. James-Robinson*, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981); *United States v. Pauth-Arzuza*, No. 80-577-Cr-CA, slip op. at 3-4 (S.D. Fla. Apr. 20, 1981); House Report, *supra* note 1, at 9-10.

190. *See supra* notes 83, 93-94, 153 and accompanying text.

191. *Coast Guard Drug Law Enforcement*, *supra* note 2, at 67 (statement of Michael P. Sullivan, Ass't U.S. Att'y, Chief, Crim. Div., S.D. Fla.).

is based on the principle of the law of the flag.¹⁹² That theory makes a ship constructively a part of the territory of the sovereign whose flag she flies.¹⁹³ As long as the manufacture or possession, and the intent to distribute, which is inferable from the large quantity of narcotics aboard,¹⁹⁴ take place on the United States flag vessel, the location of the ultimate intended distribution should be immaterial.¹⁹⁵ Employed in this manner, section 955a(a) may be viewed as a proper measure taken by the United States under the 1961 Single Convention on Narcotic Drugs,¹⁹⁶ which obligates its signatories to take steps to control illegal narcotics trafficking,¹⁹⁷ and the Convention on the High Seas, which makes it the responsibility of each State to police the vessels sailing under its flag.¹⁹⁸

192. In order to have jurisdiction over an offense under international law, a State need only meet one of the five jurisdictional requirements. *See supra* note 13 and accompanying text.

193. Jurisdiction under this principle is provided for by a statute, 18 U.S.C. § 7 (1976), that makes a vessel registered in the United States part of the special maritime and territorial jurisdiction of the United States. *Id.*; *see* *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980). *But see* *United States v. Perez-Herrera*, 610 F.2d 289, 290 n.2 (5th Cir. 1980) (§ 7 only defines special maritime and territorial jurisdiction for purposes of Title 18 offenses).

194. *United States v. Egan*, 501 F. Supp. 1252, 1260 (S.D.N.Y. 1980); House Report, *supra* note 1, at 10; *see* *Turner v. United States*, 396 U.S. 398, 422-24 (1970).

195. *Cf. United States v. Gomez-Tostado*, 597 F.2d 170, 173 (9th Cir. 1979) (location of intended distribution immaterial "so long as the intent coincides at some point with possession in the United States"); *United States v. Feld*, 514 F. Supp. 283, 286, 288 (E.D.N.Y. 1981) (same); *United States v. Madalone*, 492 F. Supp. 916, 920 (S.D. Fla. 1980) (same). Where a basis of jurisdiction, such as the law of the flag theory, is present, the issue becomes whether § 955a(a), as applied to a United States vessel, requires intent to distribute within the United States. There is no question of international jurisdiction, only one of congressional intent. *See supra* note 31 and accompanying text. In light of Congress's expressed intent that the statute have extraterritorial application, there is no reason—as long as law of the flag jurisdiction is present—to impose the same limitation upon § 955a(a) as has been imposed on § 841(a)(1). *See supra* note 153 and accompanying text.

196. Single Convention on Narcotic Drugs, *opened for signature* Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (entered into force June 24, 1967).

197. *Id.* art. 4.

198. Convention on the High Seas, *supra* note 7, art. 5. This responsibility was recognized by the court in *United States v. One (1) 43 Foot Sailing Vessel Winds Will*, 405 F. Supp. 879, 882 (S.D. Fla. 1975), *aff'd per curiam*, 538 F.2d 694 (5th Cir. 1976). *Winds Will* was a forfeiture proceeding against a vessel seized while engaged in narcotics smuggling. *Id.* at 881. The court stated that because article 6 of the Convention gives the United States exclusive jurisdiction over its flag vessels on the high seas, "the maintenance of public order on the world's oceans depends upon effective control in accordance with their treaty obligations by the nations of the world over vessels flying their flag." *Id.* at 882 (citing Convention on the High Seas, *supra* note 7, art. 6); *accord* *United States v. Hilton*, 619 F.2d 127, 131 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980); *United States v. Warren*, 578 F.2d 1058, 1064 n.4 (5th Cir. 1978) (en banc), *cert. denied*, 446 U.S. 956 (1980).

The jurisdictional defect of section 955a(a) is in its application to foreign nationals arrested aboard stateless vessels on the high seas. The opinion in *United States v. Angola*¹⁹⁹ illustrates this problem. The alien defendants were arrested aboard the stateless vessel *Mayo* approximately 350 miles from the territorial United States.²⁰⁰ The court denied the defendants' motion to dismiss for lack of subject matter jurisdiction, finding the protective theory applicable.²⁰¹ In its opinion, the court acknowledged that "the crew of the *Mayo* may not have had the specific intent to import marijuana into the United States,"²⁰² but recognized "the very great potential that other boats picking up marijuana from the *Mayo* would have taken that marijuana into this country or to some lower level of distributors who would have or might have imported that marijuana into the United States."²⁰³

The *Angola* court's application of section 955a(a) represents a literal reading of the statute. The decision demonstrates that section 955a(a), on its face, exceeds the limits of the protective principle, with its requirements of a potentially adverse effect caused by conduct directed at the security of the State.²⁰⁴ Section 955a(a) requires no showing that the conduct is directed at the United States.²⁰⁵ The *Angola* court was careful to note that it was not dealing with a situation where a stateless vessel was stopped "half way around the

199. 514 F. Supp. 933 (S.D. Fla. 1981).

200. *Id.* at 936. The vessel was seized just west of the Bahamian island of San Salvador. *Id.*

201. *Id.* at 935-36. The court adopted the holding of a prior case within the district, *United States v. Pauth-Arzuza*, No. 80-577-Cr-CA, slip op. at 4 (S.D. Fla. Apr. 20, 1981). In both cases, the courts incorrectly framed the issue before them as one of authority over a stateless vessel, rather than jurisdiction over the foreign crew members. Although the ship may be stateless, its crew members have nationalities. H. Meyers, *The Nationality of Ships* 309 (1967). Therefore, the statelessness of the ship does not affect the subject matter jurisdiction of the court over the foreign crew members. *United States v. Egan*, 501 F. Supp. 1252, 1257 n.2 (S.D.N.Y. 1980); see *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 n.5 (S.D. Fla. 1981).

202. 514 F. Supp. at 936.

203. *Id.*

204. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); Restatement (Revised) of the Foreign Relations Law of the United States § 402(3) & comment d (Tent. Draft No. 2, 1981). Compare *id.* § 402(3) (jurisdiction over "conduct outside its territory . . . directed against the security of the state or certain state interests") with Restatement (Second) of the Foreign Relations Law of the United States § 33 (1965) (jurisdiction over "conduct outside its territory that threatens its security as a state or the operation of its governmental functions"). The Tentative Draft is broader than the Second Restatement in its language concerning "certain state interests," but it makes explicit the requirement that the conduct be directed at the State. Restatement (Second) of the Foreign Relations Law of the United States § 33 (1965).

205. *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981); House Report, *supra* note 1, at 12.

world in the Gulf of Siam,"²⁰⁶ thus intimating it may not have had subject matter jurisdiction had the ship been seized so far from the United States. A literal application of section 955a(a), however, allows for no such distinctions; the statute requires no showing of a threat to the United States in order for the court to obtain jurisdiction.²⁰⁷

The jurisdictional flaw of section 955a(a) was recognized in *United States v. James-Robinson*.²⁰⁸ The district court dismissed the alien defendants' indictment under section 955a(a) for failure to allege a nexus to the United States sufficient to give the court subject matter jurisdiction.²⁰⁹ The court imposed upon the statute's application a limitation it said was required in order to conform to principles of international law.²¹⁰ When the seizure is of a stateless vessel on the high seas, manned by foreign nationals, international principles of jurisdiction require the government to allege and prove at trial that the distribution proscribed in section 955a(a) was intended for the territorial United States.²¹¹ In the court's opinion, the presence of a stateless vessel with a cargo of narcotics 400 miles from the United States did not by itself represent a threat to the United States sufficient to invoke the protective principle,²¹² though section 955a(a) on its face assumes the contrary.

The *James-Robinson* court noted that all cases in which the protective principle was invoked involved

actions where there was a demonstrable effect on the United States *in particular*. Never in a published opinion of an American court [had] a potential generalized effect, which might or might not also be an effect upon the United States, been found sufficient to invoke the protective principle of international law.²¹³

206. 514 F. Supp. at 936.

207. See *United States v. James-Robinson*, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981); House Report, *supra* note 1, at 12.

208. 515 F. Supp. 1340, 1346-47 (S.D. Fla. 1981).

209. *Id.* at 1342. The government contended that § 955a(a) "does not require the intent to distribute in the United States, an arrest in or near the waters legally controlled by this country, or any other special circumstances from which an intent to distribute [in the United States] might be inferred or a nexus with the U.S. [be] shown." *Id.*

210. See *id.* at 1346-47. The court analogized to a limitation it said had been placed upon 21 U.S.C. § 841(a)(1) (1976) by recent cases, which required that an intent to distribute within the United States be shown in order for that statute to apply extraterritorially. *Id.* at 1346 (citing *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 994 (1981); *United States v. Baker*, 609 F.2d 134, 139 (5th Cir. 1980)).

211. 515 F. Supp. at 1347.

212. *Id.* at 1346.

213. *Id.* at 1345 (emphasis in original) (footnote omitted). But see *United States v. Angola*, 514 F. Supp. 933, 936 (S.D. Fla. 1981) (protective jurisdiction proper where

The court held that for it to have jurisdiction over an offense under section 955a(a), some nexus with an interest of the United States would be essential.²¹⁴ This effect could come from "involvement of U.S. citizens, territory or vessels, from a destination (intended or realized) in the United States, or from some threat to the national security or governmental functions of the United States."²¹⁵ Such a nexus could be inferred from evidence such as the location of a ship on the high seas,²¹⁶ the size of the shipment²¹⁷ or other relevant evidence,²¹⁸ but the absence of any allegation or offer of proof of intended territorial effects precluded reaching those issues.²¹⁹

A statute that incorporates the limitation required by international law and by the *James-Robinson* court would contain as an essential element of the offense the proof of intended territorial effects.²²⁰ Congress recognized this requirement when it enacted subsection (d)²²¹ of section 955a, which proscribes possession, manufacture or

marijuana "would or might have" been imported into the United States by persons receiving marijuana from defendants); *United States v. Pauth-Arzuza*, No. 80-577-Cr-CA, slip op. at 4 (S.D. Fla. Apr. 20, 1981) (protective jurisdiction available "notwithstanding the absence of any objective proof of an intent to import into the United States"). The *James-Robinson* court noted the *Angola* and *Pauth-Arzuza* holdings without comment. 515 F. Supp. at 1346 n.9.

214. *Id.* at 1347. The court added that to act without jurisdiction would be a denial of due process under the fifth amendment of the United States Constitution. *Id.* at 1347 n.10.

215. *Id.* at 1347. The court was acknowledging, sub silentio, that in order for it to have subject matter jurisdiction over violations of § 955a(a), an internationally accepted basis of jurisdiction, such as nationality, territoriality (or its corollary, law of the flag), objective territoriality or the protective principle, has to be applicable. See *supra* pt. I.

216. *Id.* (citing *United States v. Ricardo*, 619 F.2d 1124 (5th Cir.), cert. denied, 449 U.S. 1063 (1980)).

217. 515 F. Supp. at 1347 (citing *United States v. Egan*, 501 F. Supp. 1252, 1260 (S.D.N.Y. 1980)).

218. 515 F. Supp. at 1347.

219. *Id.* at 1342, 1347.

220. See *id.* at 1346. The court said the absence of an allegation of an effect upon national security or government functions, or of any effect whatsoever, might alone render the indictment defective for failure to allege an essential fact. *Id.* (citing Fed. R. Crim. P. 7(c)(1)).

221. 21 U.S.C.A. § 955a(d) (West Supp. 1981). Subsection (d) is nearly identical to 21 U.S.C. § 959 (1976) and provides in full: "It is unlawful for any person to possess, manufacture, or distribute a controlled substance—(1) intending that it be unlawfully imported into the United States; or (2) knowing that it will be unlawfully imported into the United States." *Id.* § 955a(d). This subsection differs from § 959 in two respects. First, § 955a(d) applies to all substances controlled by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections throughout U.S.C.), not just those in schedules I and II. House Report, *supra* note 1, at 13. Second, § 955a(d) includes in its proscriptions possession with intent to unlawfully import or knowledge of impending unlawful importation. *Id.*

distribution of a controlled substance with the intent or knowledge that it will be unlawfully imported into the United States.²²² The subsection's comprehensive prohibitions are broad enough to apply to foreign nationals aboard stateless vessels, while retaining the requirement that the government allege and prove intended territorial effects.²²³ This ensures that, at a minimum, protective jurisdiction will be present. In order to apply properly to stateless vessels on the high seas, subsection (a) must be redrafted to include a requirement similar to that of subsection (d). Only by requiring that the narcotics possessed are intended for distribution within the United States will subsection (a) of section 955a conform to principles of international law.

CONCLUSION

A court claiming protective jurisdiction for the United States in a high seas prosecution of foreign nationals seized on a stateless vessel, without any showing of intended territorial effects or other threat to the sovereignty or national interest of the United States, would be unilaterally extending the protective principle further than is justified by international law. It is conceded that criminals have no regard for territorial boundaries or principles of jurisdiction and that the law must remain flexible to respond to the sophisticated techniques of today's narcotics smugglers. Absent elevation by international convention of narcotics trafficking to the status of a universally outlawed offense, however, jurisdiction such as that asserted in section 955a(a) has no basis in international law.

Customs that have developed in international law are designed to allow each state to take measures necessary to regulate conduct within its territory, the conduct of its citizens, conduct outside its territory that adversely affects or threatens to adversely affect the State, and conduct which violates the Law of Nations. The established principles of international jurisdiction accomplish these goals in a manner consistent with the maintenance of a fragile international order. Unilateral expansion of these established principles by any State is not conducive to maintenance of that order.

M. Lawrence Noyer

222. See *supra* note 176.

223. 21 U.S.C.A. § 955a(d) (West Supp. 1981).